

STATE OF CALIFORNIA

**Energy Resources Conservation
And Development Commission**

In the Matter of:

Preparation of the 2005
Integrated Energy Policy Report

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Docket: 04-IEP-1D

POST HEARING BRIEF OF SOUTHERN CALIFORNIA EDISON COMPANY

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I.

INTRODUCTION

On behalf of its customers, the Southern California Edison Company (SCE) submits its post hearing brief on the confidentiality issues raised by the Executive Director's Notice of Intent (NOI) in this proceeding.

As a matter of law and sound state policy, the California Energy Commission (CEC or Commission) should not require SCE to disclose its confidential bundled customer net short information. This information is a trade secret under state law. SCE's customers derive value from the fact that this information is not generally known and this information has been kept confidential. Moreover, as a matter of sound state policy, SCE's residual net short data (hereinafter, referred to as "bundled customer information") should remain confidential because its forced disclosure would disadvantage SCE's customers in negotiations with suppliers. Finally, and perhaps most importantly, forced disclosure of the bundled customer information is entirely unnecessary. The CEC can fulfill its public interest objectives by relying on planning area information or public sources of information

to estimate the investor owned utilities' (IOUs') future demand for electrical power. It could also adopt procedures similar to those that have been successfully followed at the California Public Utilities Commission (CPUC), where this same confidential information has been provided pursuant to appropriate protective orders. There is simply no reason for the CEC to endanger SCE's customers' interests through the forced disclosure of bundled customer information in the manner proposed by the CEC staff and recommended in the NOI.

For all of the reasons discussed in this brief, in SCE's June 17, 2005 appeal, and in the IOUs' testimony provided at the Commission's August 24, 2005 Business Meeting, SCE respectfully requests that the Commission reject the staff's recommendation and adopt a more reasonable, fair and balanced approach.

II.

AS A MATTER OF LAW, SCE'S BUNDLED CUSTOMER DATA IS A TRADE SECRET THAT THE COMMISSION MUST KEEP CONFIDENTIAL

A. Under California Law, Trade Secrets Are Privileged And Are Not Subject to Public Disclosure

The information the CEC staff would force SCE to disclose is a trade secret under California law. Civil Code section 3426.1 defines a trade secret as

... information, including a formula, pattern, compilation, program, device, method, technique, or process, that:

- (1) Derives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use; and
- (2) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Under Title 20 the Commission is required to designate a party's submission as confidential upon merely a reasonable showing that confidentiality is appropriate.¹ The CEC's regulations provide that "an application [for confidential designation] shall be granted if the applicant makes a reasonable claim that the Public Records Act or other provision of law authorizes the Commission to keep the record confidential."²

The Public Records Act, which generally permits disclosure of public records, specifically allows public agencies to withhold "records the disclosure of which is exempted or prohibited pursuant to federal or state law, including, but not limited to, provisions of the Evidence Code relating to privilege."³ The Evidence Code specifically provides a privilege protecting trade secrets from disclosure: "the owner of a trade secret has a privilege to refuse to disclose the secret, and to prevent another firm from disclosing it, if the allowance of the privilege will not tend to conceal fraud or otherwise work injustice."⁴ No party in this proceeding has alleged that granting SCE protection of its confidential information will conceal fraud or work some injustice. The CEC staff only claims (and as discussed below, SCE strongly disputes those claims) that disclosure of SCE's confidential information will somehow "level the playing field" and thereby allegedly increase the number of suppliers willing to construct electrical generating capacity in the state.

Courts have held that the central issue in determining whether something is a trade secret is whether it gains value from being kept confidential, not whether others could derive a similar system through independent effort.⁵ As SCE has

¹ See Cal. Code Regs. Tit. 20, Section 2505.

² *Id.* at Section 2505(a)(3)(A) (emphasis added).

³ Cal. Gov't. Code Section 6254(k).

⁴ Cal. Evid. Code Section 1060.

⁵ See *By-Buk Co. v. Printed Cellophane Tape Co.*, 163 Cal. App. 2d 157, 166 (1958) ("it is not necessary in order that a process of manufacture be a trade secret that it be patentable or be

Continued on the next page

demonstrated in this record, its bundled customer information is a critical component in SCE's procurement activities, which, if disclosed, would cause substantial harm to SCE's customers. If made public, the data would tell third-party electricity sellers SCE's power needs – the “residual net short or residual net long.” Revealing this information would put SCE at a distinct competitive disadvantage when procuring and selling energy on behalf of its customers.

Courts have held that data well outside the traditional “secret formulas” are trade secrets. In Courtesy Temporary Service, Inc. v. Camacho,⁶ for example, the Court held that “a customer list procured by substantial time, effort and expense is a protectable trade secret.”⁷ Even if the individual names of the persons who were Courtesy's customers are obviously themselves not secret (and can probably be found in a phone directory), the compilation itself was held to be protected. The Courtesy Court held:

Here, the evidence established that Courtesy's customer list and related information was the product of a substantial amount of time, expense and effort on the part of Courtesy. Moreover, the nature and character of the subject customer information, i.e., billing rates, key contacts, specialized requirements and markup rates, is sophisticated information and irrefutably of commercial value and not readily ascertainable to other competitors. Thus, Courtesy's customer list and related proprietary information satisfy the first prong of the definition of ‘trade secret’ under section 3426.1.⁸

Continued from the previous page

something that could not be discovered by other by their own labor and ingenuity.”); *see also Abba Rubber Co. v. Seaquist*, 235 Cal. App. 3d 1, 18 (1991).

⁶ 222 Cal. App. 3d 1278 (1990).

⁷ *Id.* at 1287.

⁸ *Id.* at 1288 (emphasis added).

Similarly, in ReadyLink Healthcare v. Cotton,⁹ the Court upheld an injunction against a former employee of ReadyLink who attempted to use ReadyLink's trade secrets in his new job. The data in question consisted of databases containing lists of ReadyLink nurses, employees, and healthcare facility customers, compilations of compensation, employment preferences, contact information, nurse applications and tests, and ReadyLink's unique per diem program.¹⁰ The Court held that ReadyLink demonstrated that "this trade secret information has potential economic value because ReadyLink went to great expense to compile the data and the information would enable a competitor to recruit away from ReadyLink nurses and employees under contract with ReadyLink."¹¹

Business plans have also been determined to be trade secrets. In Clark v. Bunker,¹² the Ninth Circuit affirmed the District Court's finding that "a detailed plan for the creation, promotion, financing, and sale of contracts for 'prepaid' or 'pre-need' funeral services" was entitled to trade secret protection. "The plan . . . encompassed all of the forms, information, and techniques, for formulating, promoting, financing, and selling contracts for 'prepaid' funeral services in the continuous operation of a mortician's business."¹³ The Court in California Intelligence Bureau v. Cunningham,¹⁴ also held that a business plan was a trade secret. California Intelligence Bureau involved a company whose business was procuring, digesting and analyzing information concerning solicitations of funds for charitable and philanthropic purposes, and distributing, by bulletin, information to subscribers for the purpose of protecting those subscribers from "false, fraudulent

⁹ 126 Cal. App. 4th 1006 (2005).

¹⁰ *Id.* at 1018.

¹¹ *Id.*

¹² 453 F.2d 1006, 1009 (9th Cir. 1972).

¹³ *Id.*

¹⁴ 83 Cal. App. 2d 197, 199 (1948).

and unworthy" solicitations. In determining that the method of operating the business was a trade secret, the court stated:

During the many years [the] plaintiff has been in business it has acquired and retains a vast amount of information relative to those who solicit funds. It knows the worthy and the unworthy. It has developed superior methods of investigation of newcomers in the field. It has evolved methods of analyzing and digesting the results of its investigations. It tersely supplies its conclusions to its subscribers. . . . All of this, including [the] plaintiff's list of subscribers, is a trade secret, confidential information, property of [the] plaintiff. [The] plaintiff's list of customers is a preferred list, a list of persons, firms and corporations willing to pay for confidential, difficult to obtain, information about persons soliciting funds.¹⁵

The Connecticut Supreme Court, in reviewing Clark and California Intelligence Bureau, found it "noteworthy that the courts deciding these cases did not parse out the business plans at issue, even though they listed the components of them, in order to determine whether each component was a trade secret. Rather, in each case, the overall plan itself was found to be a trade secret."¹⁶

B. SCE's Bundled Customer Data Is A Trade Secret

SCE's bundled customer information is a compilation of data that has great economic value to SCE's customers. If this confidential information were publicly disclosed, as the staff recommends, SCE, on behalf of its customers, would be at a

¹⁵ *Id.* at 204 (emphasis added).

¹⁶ *Elm City Cheese v. Federico*, 251 Conn. 59, 76, 752 A.2d 1037, 1044 (Conn. 1999); *see also Support Sys. Assocs., Inc. v. Tavalacci*, 135 A.D.2d 704, 705-06 (N.Y. App. Div. 1987) (holding that sealed bids containing statements of the bidder's management approach, recruiting plan, quality control and pricing constituted trade secrets); *Sigma Chem. Co. v. Harris*, 794 F.2d 371, 373-74 (8th Cir. 1986) (holding that vendor files consisting of a supplier's name and price and quality information regarding products purchased from that vendor constituted trade secrets).

serious disadvantage in negotiations with suppliers.¹⁷ Suppliers who are seeking to sell energy and capacity to SCE, armed with knowledge of how much and when SCE's customers need power, could extract higher prices than they would otherwise be able to obtain.¹⁸ Suppliers would thereby obtain economic value for themselves at the expense of SCE's customers.¹⁹ SCE has gone to not only reasonable, but to extraordinary, lengths to maintain the secrecy of its bundled customer information.²⁰ Therefore, SCE's bundled customer information satisfies all of the elements of a trade secret under California law.

SCE has in this record demonstrated that its confidential information is without question a trade secret. All parties, including even those who wish to release the bundled customer information, agree that the information has economic value.²¹ All parties agree that the information is not generally known to the public.²² In particular, the suppliers who could use this highly sensitive information to their economic advantage, have not had access to SCE's bundled customer information.²³ SCE's efforts to keep the information confidential have been reasonable and effective. Indeed, the CEC staff's witnesses made an exhaustive search of public data sources and concluded that SCE's bundled

¹⁷ Declaration of Kevin R. Cini (Cini Decl.), attached as Appendix 4 to SCE's Appeal of Executive Director's Notice of Intent to Release Aggregated Data, dated June 17, 2005 (SCE Appeal), at ¶¶ 14, 16, 19-23.

¹⁸ *Id.*, at ¶ 14; *see also* Declaration of Dr. Charles F. Plott (Plott Decl.), attached as Appendix 3 to SCE Appeal, at ¶ 5; SCE Rebuttal Testimony, filed with the California Energy Commission, dated August 12, 2005 (SCE Rebuttal), at 28-30, 40-43 (Plott); Transcript of Proceedings before California Energy Commission's Business Meeting, August 24, 2005 (Transcript), at 51:7-20; 44:13-19; 91:12-16; 129:16-130:8; 138:18-139:5.

¹⁹ SCE Rebuttal, at 2-3 (Stern), 28-29 (Plott); Cini Decl., at ¶ 14.

²⁰ Cini Decl., ¶ 17; SCE Rebuttal, at 59-60 (Hemphill); Transcript, at 250:8-12; 256:19-25.

²¹ *See, e.g.*, SCE Rebuttal, at 39 (Plott); Cini Decl., at ¶¶ 15-16; Transcript, at 51:7-20; 44:13-19; 213:22-214:9; 279:9-15; 361:5-7.

²² SCE Rebuttal, at 59-60 (Hemphill); Cini Decl., at ¶¶ 9, 17; Transcript, at 102:8-9; 199:9-12; 256:19-25.

²³ SCE Rebuttal, at 59-60 (Hemphill).

customer information was not published in any public database.²⁴ Although the CEC staff was able to find similar information, it could not find identical information that was attributable to SCE as the source.²⁵

In their attempt to undermine the validity of SCE's claim of privilege, the staff raises several unavailing arguments. Staff through its witness Julia Frayer claims that forced disclosure will actually benefit customers. This misguided notion was thoroughly rebutted by Dr. Plott.²⁶ Dr. Plott conducted numerous market studies that demonstrate conclusively that the forced disclosure of SCE's bundled customer net short data would strongly influence market outcomes.²⁷ In times of relative shortage (such as the California market now faces), the revelation of net short information will cause the prices paid for power to rise.²⁸

The staff also claims that similar information is available publicly.²⁹ However, the record demonstrates, and the staff witnesses reluctantly concede, that SCE's bundled customer information has never been released publicly.³⁰ SCE has consistently and steadfastly protected the interests of its customers by keeping its bundled customer information confidential.

Staff witness Dr. Michael Jaske claimed in his testimony that the CPUC has ordered SCE and the other utilities to publicly disclose its bundled customer information.³¹ This assertion is false. The information required by the CPUC

²⁴ Transcript, at 199:9-12; 274:1-6.

²⁵ *Id.*

²⁶ SCE Rebuttal, at 18-51 (Plott).

²⁷ *Id.*, at 18-43 (Plott); *see also* Plott Decl., ¶¶ 4-5, and Exhibit A thereto.

²⁸ SCE Rebuttal, at 36 (Plott); Transcript, at 66:11-15.

²⁹ *See, e.g.*, CEC staff Rebuttal Testimony, dated August 12, 2005 (CEC staff Rebuttal), at 5-8; Testimony of Julia Frayer, submitted July 8, 2005, at 12-13; Testimony of Michael R. Jaske, Ph.D., dated July 8, 2005, at 6-7.

³⁰ SCE Rebuttal, at 59-60 (Hemphill); Cini Decl., at ¶ 9, 17; Transcript, at 199:9-12; 256:19-25; 274:1-6.

³¹ Testimony of Michael R. Jaske, Ph.D., dated July 8, 2005, at 15; CEC staff Rebuttal, Attachment H, at 2-4.

administrative law judges to be released was not bundled customer data.³² The data required to be released was "system" data.³³ System data is similar to the planning area data that SCE has no objection to being released in this proceeding.³⁴

III.

AS A MATTER OF SOUND STATE POLICY, SCE'S BUNDLED CUSTOMER DATA SHOULD REMAIN CONFIDENTIAL

A. Forced Disclosure Of SCE's Bundled Customer Data Will Harm SCE's Customers

Not only does California state law require the protection of SCE's bundled customer data, its protection is also sound and common sense policy. California consumers have suffered greatly at the hands of supplier manipulation of the market during the energy crisis. They have borne over \$40 billion of additional costs and are continuing to bear this substantial burden. SCE's customers should not be placed in a position to suffer from further market manipulation resulting from the forced public release of bundled customer information.

Forced public release of SCE's bundled customer information as proposed by the CEC staff would prevent SCE from obtaining the best prices and contract terms on behalf of its customers. The experiments conducted by Dr. Plott clearly demonstrate that the one-sided disclosure of a buyer's demand information does not and cannot help the buyer.³⁵ More specifically, disclosure of SCE's residual net

³² SCE Rebuttal, at 60 ("Nothing in the May 9 Ruling requires the release of anything related to bundled customer demand")(Hemphill).

³³ SCE Rebuttal, at 60 (Hemphill).

³⁴ *Id.*, at 62 (Hemphill).

³⁵ SCE Rebuttal, at 26-40, 51 ("All relevant economic theory, experimental economics, and common sense yield the same outcome: Disclosing buyer information to sellers leads to higher prices being paid by the buyers, while providing new profit opportunities for sellers.")(Plott); Plott Decl., at ¶¶ 4-5.

short data will cause prices to rise if overall supply is tight.³⁶ Tight supply conditions in the California electricity market have been announced in public reports issued by this Commission and the CAISO, which indicate that insufficient capacity exists to meet consumers' needs in southern California under certain conditions beginning as early as Summer 2006, and under nearly all projected scenarios in later years.³⁷

The CEC staff and its consultant attempted to dismiss Dr. Plott's initial study submitted to the Commission that concluded higher prices would result from the staff's proposed one-sided disclosure of demand information. The staff argued that Dr. Plott's study was inapplicable to the California market because (1) the experiments used in the study did not use an "auction" mechanism; (2) the study's conclusions about increased pricing would not apply in the absence of collusion or the exercise of market power by a supplier; and (3) the experiments divulged more than just residual net short information to suppliers by including information relating to the marginal value buyers placed on incremental quantities of the product being sold, which would not be released by the CEC staff's proposal.³⁸

Although the general conclusions drawn in Dr. Plott's initial study do in fact apply to the market conditions in the California market for electrical power,³⁹ Dr. Plott nevertheless conducted a second set of experiments to specifically show that the CEC staff's criticisms of his conclusions were unfounded and incorrect. As explained in his rebuttal testimony, Dr. Plott's second study does just that.⁴⁰ The study used an "auction" format in which only the residual net short of the buyer was

³⁶ SCE Rebuttal, at 36 (Plott).

³⁷ See, e.g., "Summer 2005 Supply and Demand Outlook," CEC staff Paper, February 2005; "2005 Summer Operations Assessment," CAISO, March 23, 2005; "Revised California and Western Electricity Supply Outlook Report," draft CEC staff report, July 21, 2005.

³⁸ SCE Rebuttal, at 18 (Plott).

³⁹ *Id.*, at 24 (Plott).

⁴⁰ *Id.*, at 18-43 (Plott).

made known to the sellers.⁴¹ Under these specific conditions, Dr. Plott's initial conclusions were again confirmed – prices rose significantly due to disclosure of demand information, when the known overall supply was scarce.⁴² This occurred without any collusion among suppliers or exercise of market power by a particular supplier. As Dr. Plott demonstrates, collusion is not necessary because suppliers will universally increase their bids on their own when they know the needs of a buyer (its residual net short) and that its needs are large in relation to the amount of available supply.⁴³

The CEC staff argues that disclosure of SCE's bundled customer information somehow will not harm its customers because SCE's forecast of its customers' needs would change between the time SCE submits this information to the Commission and the year in which that need would actually occur.⁴⁴ This contention is short-sighted and erroneous. The CEC staff cannot have it both ways: the information is either valuable to suppliers for their planning purposes or, because it is subject to change, it cannot be relied upon and would not be a useful signal to potential new suppliers. The CEC staff's argument also ignores the fact that SCE regularly issues Requests for Offers (RFOs) to secure capacity for periods of up to five years, and in some instances longer.⁴⁵ Indeed, SCE is relying on its current forecasts of bundled customer information for at least the next five years for its procurement activities right now.⁴⁶ The CEC staff's suggestion that the data it proposes to disclose will not

⁴¹ *Id.*, at 21, 23-25 (Plott).

⁴² *Id.*, at 26 (Plott).

⁴³ SCE Rebuttal, at 28-29 (Plott).

⁴⁴ Transcript, at 187:14-19; 300:7-13.

⁴⁵ Indeed, SCE currently has issued an RFO seeking bids for terms of up to 5 years and an RFO (to serve the needs of the SP-15 planning area) seeking bids for terms of up to 10 years. *Id.*, at 51:2-6; 51:21-52:8.

⁴⁶ *Id.*, at 56:4-9.

influence prices because forecasts might change over time is naïve and ignores the realities of the IOUs' procurement practices.

Similarly, the staff's assertion⁴⁷ that SCE's customers would not suffer harm because SCE could simply elect not to accept any bids from an RFO if bid prices increased from knowledge of bundled customer information is misguided. Failing to accept a single bid from an RFO would suggest to the market that SCE had issued its RFO in bad faith and might cause fewer suppliers to bid on future SCE RFOs.⁴⁸ Moreover, SCE would still need to obtain the capacity it originally sought, likely through the issuance of yet another RFO to suppliers who still have the advantage of knowing the amount of SCE's customers' needs.

B. Forced Disclosure of SCE's Bundled Customer Data Will Enrich Only Suppliers

Public disclosure of SCE's bundled customer information would provide a commercial benefit solely to suppliers. All parties agree that this information provides at least some economic value to those who know it.⁴⁹ In fact, Stephen Kelly, representing the Independent Energy Producers Association confirmed the value of this information to suppliers in his remarks to the Commission: "[t]here's a competitive advantage to those who know this data."⁵⁰ Accordingly, the dispute among the parties with respect to the benefits of public disclosure is not whether suppliers will in fact benefit (because they clearly will), but whether SCE's customers would also benefit, in the form of lower prices for capacity and energy. SCE has established in this appeal that its customers will not benefit from the disclosure proposed by CEC staff. To the contrary, disclosure would cause prices to

⁴⁷ *Id.*, at 36:20-24; 217:19-22.

⁴⁸ *Id.*, at 55:1-10.

⁴⁹ Cini Decl., ¶ 17; SCE Rebuttal, at 59-60 (Hemphill); Transcript, at 213:22-214:9; 279:9-15.

⁵⁰ Transcript, at 361:6-7.

rise. The CEC staff's claim that disclosure is likely to result in lower prices depends entirely upon an incorrect theory advanced by the staff's consultant, Ms. Frayer, which has no application to the California electricity market.

Ms. Frayer erroneously claims that disclosure of SCE's bundled customer information would spur new investment in generation, bring additional suppliers into the market, and thereby increase competition and lower prices to the buyer (SCE).⁵¹ However, as discussed at length in the rebuttal testimony of Dr. Plott, Ms. Frayer misunderstands the principles of the bidding and information theory she uses, and therefore arrives at inaccurate conclusions about the effect of revealing demand information.⁵² As Dr. Plott states, Ms. Frayer "takes general descriptions of a model that is completely unrelated to the issues at hand and misapplies the conclusions of the model."⁵³ Specifically, the "common value auctions" model used by Ms. Frayer relates to the effect of disclosing information about *the features of the commodity* being purchased or sold (i.e. the amount of oil in the ground), and not information about the quantity a buyer might want.⁵⁴ This type of information has nothing to do with the disclosure proposed by CEC staff here – the unilateral disclosure to suppliers of the amount of demand a buyer needs to meet. Accordingly, each of Ms. Frayer's statements about the positive consequences for buyers of one-sided disclosure (i.e. increased seller competition and cost reduction) are wrong.⁵⁵

Ms. Frayer not only misunderstands the economic theories she cites, but her testimony also reveals that she does not understand the actual features of the California electricity market. For example, as discussed in the rebuttal testimony

⁵¹ *Id.*, at 208:7-17.

⁵² SCE Rebuttal, at 45-50 (Plott).

⁵³ *Id.*, at 45 (Plott).

⁵⁴ *Id.*, at 46 (Plott).

⁵⁵ *Id.*, at 46-48 (Plott).

of Dr. Stern, Ms. Frayer erroneously claims that market manipulation by suppliers would be extremely difficult because the California electricity market already has many sellers and there are no barriers to entry for additional suppliers.⁵⁶ First, with respect to the number of existing suppliers, there are in fact very few sellers with sufficiently large portfolios and appropriate creditworthiness to meet the capacity needs of SCE's customers.⁵⁷ Not surprisingly, Ms. Frayer admitted during cross-examination that she has no idea how many credit-worthy suppliers are in California and, more importantly, that she did not even know that the CPUC requires the IOUs to contract with only those suppliers that meet a certain threshold of creditworthiness.⁵⁸ Ms. Frayer also erroneously believes that SCE has sold its transmission lines.⁵⁹ With respect to entry barriers, Ms. Frayer's overly simplistic conclusion that there are no barriers to entry ignores the reality that long lead times, siting issues, and significant capital investment are required to construct and bring new generation on line.⁶⁰ Moreover, generators have indicated that they need long-term contractual commitments (of a minimum of ten years) in order to secure appropriate financing to construct new generation facilities.⁶¹

In light of the glaring errors and misconceptions in Ms. Frayer's economic analysis and her lack of familiarity with the California electricity market, her conclusion that prices would be reduced by the CEC staff's proposed one-sided disclosure of SCE's market sensitive data cannot be accepted. Indeed, as established though the analysis of Dr. Plott, the only parties that will benefit from the staff's proposed forced disclosure are the suppliers, in the form of increased

⁵⁶ SCE Rebuttal, at 5 (Stern).

⁵⁷ *Id.*, at 5-6 (Stern), Transcript, at 125:7-17.

⁵⁸ Transcript, at 246:20-25; 248:8-13.

⁵⁹ *Id.*, at 262:2-12.

⁶⁰ SCE Rebuttal, at 7 (Stern).

⁶¹ Transcript, at 126:7-12.

prices for the energy and capacity that SCE must obtain to serve its customers' needs.

C. The Record Supports Confidentiality Protection For Bundled Customer Data

The CEC staff acknowledges that, at least in the near term, bundled customer information is highly sensitive and would likely give suppliers a negotiating advantage that would result in ratepayer harm.⁶² However, the staff advocates only a three-year "blackout" period for bundled customer demand information (keeping 2006-2008 data confidential) in its proposal. The staff argues that longer-term information would encourage investment by new suppliers and bring more competition to the supply market.⁶³ As discussed above, SCE disputes the conclusion that any competitive benefit will result from the disclosure of its confidential data.

The staff's proposed three-year blackout window is wholly inadequate in light of SCE's and the other IOUs' ordinary procurement activities. RFOs are frequently issued by the IOUs for periods of up to five years and longer. SCE currently has an open RFO seeking to secure capacity for a period of up to five years.⁶⁴ Release of SCE's demand information for 2009 and 2010 by this Commission would directly impede SCE's ability to obtain the best pricing for its ratepayers in its five-year RFO.

In addition, the staff's own analysis of the time needed for generation projects to be completed, when considered with the variables the staff failed to include in the analysis, indicate that a longer blackout period would be necessary. The CEC staff

⁶² Testimony of Kevin M. Kennedy, July 2005, at 3.

⁶³ *Id.* at 3-4.

⁶⁴ Transcript, at 51:4-6.

has asserted that a three-year blackout window is sufficient because new suppliers would be able to enter the market with new generation projects if they were aware of projected needs beginning four years from the present. To support this claim, the CEC staff submitted testimony stating that the average length of time for a new non-peaker project to come on-line is four years and two months, and thus data beginning in the fourth year could bring new competitors into the market.⁶⁵ However, as CEC staff conceded, the calculations of this average period only included the time from preparing an Application for Certification to the date the projects came on-line.⁶⁶ The staff did not consider several important factors relating to development of new generation, including: (1) time for the purchasing IOU to issue an RFO and select the bid, (2) time needed for the purchasing IOU to obtain CPUC approval of the contracts, (4) time needed to conduct any necessary transmission studies.⁶⁷ These factors, when taken into account, would likely add several years to the calculated average for new generation development offered by the CEC.

At least five of the projects identified in Mr. Kennedy's timelines required five years or more to come on line, without consideration of the key factors identified above. When the additional factors are taken into account, these projects would have likely required many more years to complete development and be put into operation. Accordingly, a three-year "blackout" period as proposed by the CEC staff is inadequate should be rejected.

⁶⁵ CEC staff Rebuttal, Attachment D at 1 (Kennedy).

⁶⁶ Transcript, at 342:24-343:10; *see also* CEC staff Rebuttal, Attachment D, at 1.

⁶⁷ Transcript, at 342:4-343:7.

IV.

THERE ARE ALTERNATIVES TO THE FORCED DISCLOSURE OF SCE'S BUNDLED CUSTOMER DATA THAT WILL ALLOW THE CEC TO FULFILL ITS PUBLIC INTEREST OBJECTIVES

A. The CEC's Public Interest Objectives

The CEC certainly has important public interest objectives that must be served. The CEC's goal should be to harmonize those important objectives with the interests of SCE's customers in maintaining the confidentiality of certain market sensitive information. This is the balance the Commission must strike. As discussed below, there are several alternatives available to the Commission that will allow it to fulfill its public interest objectives, while still maintaining the confidentiality of SCE's bundled customers' market sensitive information.

The CEC's public interest objectives are clear: provide a forecast of the state's need for electrical generating resources to provide signals for new generation in the State, and recommend statewide policies for meeting resource needs. The CEC's forecast will be used in the CPUC's 2006 procurement proceeding as the resource plan for the state:

CEC's 2005 . . . IEPR process will estimate need for resource additions, evaluate policies and recommend appropriate resource strategies for the state to meet forecasted load on a biennial cycle. All load serving entities will provide load forecasts, resource plans and transmission assessment as input into the IEPR process. The CAISO will provide the key policy issues and components of its transmission assessment processes. The IEPR will (1) identify likely range of statewide and LSE-specific need and resource assessment to be used by the CPUC when evaluating in IOU's long term procurement plans for submittal in the 2006 CPUC procurement process, (2) provide disaggregated load forecasts to CAISO for use by PTOs and CAISO in the

next transmission cycle, and (3) recommend broad, statewide resource preference policies.”⁶⁸

The CEC and the CPUC are bound by the requirements of law and their own regulations in meeting these objectives. In particular, these agencies must recognize the rights of the participants in their proceedings to protection of their market sensitive and proprietary information. It is in striking the balance that the CEC staff’s recommendation fails. The staff’s proposal completely disregards the interests of the IOUs’ customers and proposes to institute a one-sided and partial release of market sensitive information. Their recommendation should not be adopted because, as discussed below, there are alternatives that would allow the CEC to fulfill its public interest objectives, while still preserving the confidentiality of the IOUs’ information in a manner that is consistent with the law and the rules of the respective state agencies.

B. The CEC Could Rely On Planning Area Data

In this appeal, SCE has not opposed the public release of information aggregated at the planning area level. Data aggregated in this manner would appropriately identify area-specific need throughout the state and thus provide all of the information that suppliers need to make investment decisions.⁶⁹ Accordingly, the Commission can fulfill its public interest objectives and provide signals to suppliers without publicly revealing any IOU’s net short position.

Suppliers do not need IOU bundled-customer information in order to appropriately respond to the needs of California consumers. PG&E’s witness Jim Shandalov, who previously worked for a generator (Mirant), confirmed that annual planning area data would be sufficient to encourage investment in generation

⁶⁸ CPUC President Peevey, September 16, 2004 Assigned Commissioner’s Ruling, in R.04-04-003, at Attachment A (September 16 ACR).

⁶⁹ SCE Rebuttal, at 62 (Hemphill).

projects.⁷⁰ Moreover, as discussed in the rebuttal testimony of Mr. Hemphill, making public one class of LSEs' residual net short position (as the CEC staff proposes to do by not requiring disclosure of similar demand data by other LSEs, the Electric Service Providers) fails to provide appropriate information about the State's overall need for new generation.⁷¹ California IOUs are primarily procurers of contracts with generators, meaning that a substantial portion of their demand information would merely reflect the end of contractual commitments.⁷² The end of a contract does not confirm a need for new generation.⁷³ It is planning area data that provides all the information suppliers need with respect to the need for new generation in the state or in the regions served by the IOUs.⁷⁴

SCE and the other California IOUs have also thoroughly rebutted the CEC staff's assertion that the California IOUs should disclose their bundled customer information because certain other utilities have released similar information. Dr. Jaske identified several out-of-state IOUs and California publicly-owned utilities (POUs) as examples of entities that have publicly disclosed their customer's demand information.⁷⁵ However, as discussed in Mr. Hemphill's rebuttal testimony, the non-California IOUs cited by Dr. Jaske have between 79 to 91 percent utility-owned generation, whereas the California IOUs are far more dependent on the market to obtain their resources because only 30 to 35 percent of California generation is utility owned.⁷⁶ In addition, Dr. Jaske's claim that the percentage of "bilateral

⁷⁰ Transcript, at 139:8-12.

⁷¹ SCE Rebuttal, at 62 (Hemphill).

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.* Even the CEC staff's witness, Ms. Frayer, agrees that planning area information would be valuable to suppliers in making their investment decisions. Transcript, at 271:12-21.

⁷⁵ Testimony of Michael R. Jaske, Ph.D., July 8, 2005, at 4-5.

⁷⁶ SCE Rebuttal, at 53-56 (Hemphill). In addition, as described in the table contained at pages 54-56 of SCE's rebuttal testimony, the status of deregulation in each state where the non-California utilities are cited is considerably different from California.

contracts” for 2009 in the California IOUs’ portfolios is virtually the same as the percentage held by the non-California IOUs⁷⁷ is misleading and incorrect because Dr. Jaske admittedly excluded the California IOUs’ Department of Water Resources contracts and Qualifying Facility contracts.⁷⁸ The POUs’ willingness to disclose their customers’ demand information likewise has no application to the IOUs because, as discussed in the CEC staff’s recent supply outlook report, POUs’ procurement practices and generation assets are entirely different from that of the IOUs.⁷⁹ POUs are also not subject to customer base instability due to direct access and community choice aggregation.⁸⁰

In sum, public disclosure of planning area information is sufficient to enable this Commission to meet its public interest objectives. The CEC staff has been unable to show that the more specific, and highly market-sensitive, bundled customer demand information (which will reveal the IOUs’ residual net short) needs to be publicly disclosed for the Commission to provide its policy recommendations and identify resource needs to the CPUC as it has always done in the past without such disclosure.

C. The CEC Could Rely On Public Information

Dr. Jaske argues at length in his written testimony that the CEC staff should be able to publicly disclose the bundled customer demand information at issue because SCE and the other California IOUs have already publicly disclosed similar or even identical information in other forums.⁸¹ SCE disagrees with much of Dr. Jaske’s characterization of the information it has publicly disclosed (or is required

⁷⁷ CEC staff Rebuttal, Attachment C at 2 and Table 1 (Jaske).

⁷⁸ Transcript, at 309:9-11; 313:2-22.

⁷⁹ SCE Rebuttal, at 57 (Hemphill).

⁸⁰ *Id.*

⁸¹ Testimony of Michael R. Jaske, Ph.D., July 8, 2005, at 6; CEC staff Rebuttal, Attachment H at 2-4 (Jaske).

to disclose) and the extent to which that information relates to the forced disclosure the CEC staff recommends here.⁸² Nevertheless, if the Commission is inclined to accept Dr. Jaske's claim, then there is no reason to require SCE to disclose its bundled customer information because (according to Dr. Jaske) this information can already be "easily" estimated from publicly available information.⁸³ In other words, the Commission can simply rely on public information and avoid releasing the IOUs' bundled customer information.

D. The CEC Could Adopt A Protective Order Procedure Similar To The Procedure Adopted By The CPUC

As an alternative approach, this Commission could adopt a procedure that would permit a limited dissemination of the IOUs' highly-sensitive bundled customer demand information to non-market participants, consistent with protective orders currently utilized by the CPUC. This approach would have the benefit of adding transparency to the Commission's process by permitting appropriate non-market participants (*i.e.* consumer advocate groups) to have access to bundled customer information used in developing the IEPR, while still protecting the IOUs' customers from the substantial harm that would result from release of the information to suppliers. As discussed above, suppliers would still receive sufficient information to encourage new generation development in the form of planning area data. SCE does not object to release of such information by the CEC.

To the extent the Commission decides to adopt a protective order procedure, SCE recommends the use of a protective order similar to the one recently adopted in the CPUC's avoided cost proceeding.⁸⁴ For example, the protective order approved

⁸² SCE Rebuttal, at 59-61 (Hemphill).

⁸³ Testimony of Michael R. Jaske, Ph.D., July 8, 2005, at 6.

⁸⁴ See Administrative Law Judges' Ruling on Protective Order and Remaining Discovery Disputes, May 9, 2005, in R.04-04-025 (May 9 ALJ Protective Order Ruling).

by the Administrative Law Judge in that proceeding allows non-market participants to review IOUs' confidential proprietary information and use it in subsequent filings with the CPUC, provided the portions of the filing containing confidential information are filed under seal.⁸⁵ This Commission could adopt a protective order allowing for similar access by non-market participants to bundled customer information submitted by the IOUs. Such an order would permit appropriate parties to participate more fully in the 2005 IEPR process and future CPUC proceedings involving the 2005 IEPR, without risking substantial harm to IOU ratepayers from public disclosure of bundled customer information.

V.

**THE CEC SHOULD, AS A MATTER OF SOUND PUBLIC POLICY,
COORDINATE ITS POLICY ON THE TREATMENT OF CONFIDENTIAL
INFORMATION WITH THE POLICY OF THE CPUC**

Prior to the hearings on this matter, SCE, Pacific Gas and Electric (PG&E), and San Diego Gas and Electric (SDG&E) (collectively, the Joint Parties) filed a motion to defer a ruling on the confidentiality issues raised by the NOI.⁸⁶ The deferral would allow the CEC to coordinate its policies on the confidential treatment of information with the policies of the CPUC. The motion also indicates a desire for the parties to meet and confer during the deferral period on ways to resolve the dispute in a manner that protects the Joint Parties' confidential information while still allowing the CEC to meet its public interest objectives.

⁸⁵ *Id.*, at 5, and Attachment A thereto at A-5.

⁸⁶ Motion of Joint Parties Pacific Gas and Electric Company, Southern California Edison Company and San Diego Gas and Electric Company to Defer Decision on Appeal Pending Further Proceedings in CPUC Order Instituting Rulemaking Relating to Confidentiality of Information, filed August 22, 2005.

The motion of the Joint Parties should be granted. If the staff position is adopted as proposed, the CEC's treatment of confidential information would be contrary to the treatment the CPUC has to date afforded the exact same information. The CPUC has identified SCE's bundled customer net short information as market-sensitive information.⁸⁷ Moreover, the CPUC has adopted procedures for non-market participants to have access to confidential information while strictly prohibiting its release to market participants.⁸⁸ Under those procedures, all parties, including market participants, have been able to effectively participate in important CPUC proceedings. There is no reason why such procedures would not work just as well at the CEC.

In addition, Public Utilities Code section 454.5(g) and CPUC rulings implementing that section indicate that bundled customer information must be protected. The code section provides:

The commission shall adopt appropriate procedures to ensure the confidentiality of market sensitive information submitted in an electrical corporation's proposed procurement plan⁸⁹

In its procurement plan proceedings under section 454.5(g), the CPUC has issued several rulings indicating that bundled customer information, or substantially similar information, should and will be protected from disclosure to the public.⁹⁰ The confidentiality requirements of section 454.5 should likewise bind the CEC in this proceeding because the results of the IEPR process will be relied upon in the CPUC's 2006 procurement plan proceeding.

⁸⁷ SCE Rebuttal, at 60.

⁸⁸ See, e.g., Attachment A to May 9 ALJ Protective Order Ruling.

⁸⁹ Cal. Pub. Util. Code Section 454.5(g).

⁹⁰ See, e.g., Administrative Law Judge's Ruling Regarding Confidentiality of Information and Effective Public Participation, in R.01-10-024, in R.01-10-024; May 9 ALJ Protective Order Ruling.

The need for consistent treatment of the confidential information is imperative in this proceeding because of the special role the CEC is playing in the CPUC's resource plan proceeding. Pursuant to CPUC President Peevey's March 14, 2005 Assigned Commissioner's Ruling (ACR) in R.04-04-003, the results of the 2005 IEPR will be used in the CPUC's 2006 procurement proceeding as the resource plan for the state. Earlier in the procurement proceeding, CPUC President Peevey, in another ACR, stated that "In general, we see the CEC's 2005 IEPR as the initiation of a new, integrated, statewide resource planning process."⁹¹ The September 16 ACR stated furthermore that:

We view the CEC's IEPR process, in particular, as the appropriate venue for considering issues of load forecasting, resource assessment, and scenario analyses, to determine the appropriate level and ranges of resource needs for load serving entities (LSEs) in California.⁹²

In the March 14, 2005 ACR, CPUC President Peevey recounted the role that the CEC and its staff would play in the CPUC's procurement proceeding:

The CEC's IEPR Committee has agreed that CPUC staff will participate in the IEPR process as "collaborative staff," in the same manner in which CEC staff has participated in the CPUC's procurement and related proceedings over the course of the past year.⁹³

The collaborative relationship between the two agencies dictates that their policies, particularly on issues such as confidentiality, should be coordinated and consistent. The CPUC is currently reviewing its policies on the treatment of confidential information. In R.05-06-040, the CPUC is undertaking a broad and comprehensive review of its confidentiality policies. Some of its policies may change in ways that cannot be predicted at this time. However, no matter how those

⁹¹ September 16 ACR, at 2.

⁹² *Id.*

⁹³ CPUC President Peevey, March 16, 2005 Assigned Commissioner's Ruling in R.04-04-003, at 6.

policies may change, there is a need for consistency between the policies of these two state agencies. The motion of the Joint parties, if granted, would allow such coordination and consistency. Releasing SCE's confidential information would violate current CPUC policy and would presuppose the outcome of the CPUC's rulemaking on confidentiality. For all of these reasons and the reasons stated in the Joint Parties motion, the CEC should defer ruling on the Executive Director's appeal.


VI.

CONCLUSION

For the reasons discussed above, the Commission should grant SCE's appeal and maintain SCE's bundled customer information as confidential. In the alternative, the Commission should grant the Joint Parties' motion to defer ruling here pending the outcome of the CPUC's Confidentiality OIR (R.05-06-040).

Respectfully submitted,

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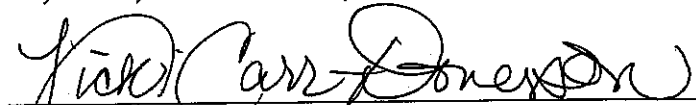
September 1, 2005

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